78-1821

No.

In the Supreme Court of the United States

OCTOBER TERM, 1978

UNITED STATES OF AMERICA, PETITIONER

v.

SYLVIA L. MENDENHALL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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The Solicitor General, on behalf of the United States, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals (App. A, *infra*, 1a-7a) is not yet reported. The opinion of the panel (App. B, *infra*, 8a) and the opinion of the district court (App. C, *infra*, 9a-20a) are not reported.

JURISDICTION

The judgment of the en banc court of appeals was entered on April 6, 1979. On April 27, 1979, Mr.

Justice Stewart extended the time within which to file a petition for a writ of certiorari to June 5, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether federal narcotics agents who approach a person and ask for identification on the basis of facts that in their experience indicate that the person may be a narcotics courier violate the Fourth Amendment whenever the observed facts can be said to be consistent with innocent behavior.

2. Whether federal narcotics agents, in requesting a suspected narcotics courier to move from the public areas of an airline terminal to a nearby office for further questioning, have effected an arrest that is unconstitutional unless supported by probable cause.

3. Whether a suspect who is being illegally detained can validly consent to a search.

STATEMENT

1. Since October 1974, the Drug Enforcement Administration has operated an extensive airport surveillance program designed to intercept couriers transporting narcotics between major drug origination and distribution centers in the United States. The program was primarily initiated and developed by DEA agents at the Metropolitan Detroit Airport, a major drug distribution center, and now operates at more than 20 airports throughout the nation. The program has resulted in the interdiction of substantial quantities of illicit drugs and has also generated

a corresponding abundance of litigation in the lower federal courts.[1] Under the program, trained and experienced agents observe arriving and departing passengers on certain flights for characteristics and behavioral traits which, on the basis of their collective experience, have tended to distinguish drug couriers from other passengers.[2] The DEA and its agents in the field have also developed relatively standard procedures for approaching and questioning individuals suspected of being drug couriers. This case rep-

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[1] For statistics relating to the success of the program in interdicting narcotics and narcotics couriers, see App. A, *infra*, 4a n.1; *United States* v. *Van Lewis*, 409 F. Supp. 535 (E.D. Mich. 1976), aff'd, 556 F. 2d 385 (6th Cir. 1977). See also discussion, *infra*, page 11 n.13.

For some of the recent cases considering suppression motions arising out of the operation of the program see *United States* v. *Price*, No. 78-1386 (2d Cir. May 18, 1979); *United States* v. *Rico*, 594 F. 2d 320 (2d Cir. 1979); *United States* v. *Oates*, 560 F. 2d 45 (2d Cir. 1977); *United States* v. *Elmore*, No. 78-5304 (5th Cir. May 22, 1979); *United States* v. *Troutman*, 590 F. 2d 604 (5th Cir. 1979); *United States* v. *Ballard*, 573 F. 2d 913 (5th Cir. 1978); *United States* v. *Pope*, 561 F. 2d 663 (6th Cir. 1977); *United States* v. *McCaleb*, 552 F. 2d 717 (6th Cir. 1977); *United States* v. *Chatman*, 573 F. 2d 565 (9th Cir. 1977).

[2] These traits and characteristics, sometimes referred to as a "drug courier profile," include such elements as round trips of short duration between major drug centers, purchasing tickets with cash (and particularly small bills), no baggage except carry-on-items, deplaning last, and, in general, nervous or unusual behavior. See *United States* v. *Van Lewis*, *supra*, 409 F. Supp. at 538. These guidelines, their development, and the way in which they are used are more fully described at page 17 n.17, *infra*.

resents a fairly typical example of the operation of the airport surveillance program and of the legal questions that it has generated.

2. Following a non-jury trial on stipulated facts in the United States District Court for the Eastern District of Michigan, respondent was convicted of possession of heroin with intent to distribute it in violation of 21 U.S.C. 841 (a)(1).[3]

The evidence at a pretrial suppression hearing showed that early on the morning of February 10, 1976, two DEA agents stationed at the Detroit Metropolitan Airport were observing passengers deplaning from an American Airlines flight from Los Angeles. Los Angeles was known to the agents as a major source of narcotics (Tr. 10-11, 20). Agent Anderson's attention was drawn to respondent, who was the last person to leave the airplane. In his experience, which included participation in more than 100 arrests during his assignment to the Detroit Airport (Tr. 9; App. C, *infra*, 13a-14a), drug couriers tend to deplane last, particularly on early morning flights, so that they can more easily detect agents who might be watching them (Tr. 12).

Anderson testified that respondent "completely scanned the whole area where we were standing" and "appeared to be very nervous" as she came off the airplane (Tr. 11, 20). Respondent proceeded past the baggage claim area but claimed no luggage—a

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[3] Respondent was sentenced to a term of 18 months' imprisonment, to be followed by a three-year special parole term.

fact which the agents had found to be another common characteristic of drug couriers (Tr. 10, 12). Respondent instead went to the Eastern Airlines ticket counter (Tr. 13). Agent Anderson stood in line directly behind her at the counter and watched as she took from her purse an American Airline ticket marked for travel from Los Angeles through Detroit to Pittsburgh (Tr. 12-13). Respondent sought to change her ticket from American to Eastern, but kept Pittsburgh as her destination (Tr. 13); this was significant to the agent because couriers frequently change airlines to evade surveillance and detection (Tr. 13-14).

Respondent then left the ticket counter and headed for the Eastern flight departure gate (Tr. 14). The agents approached her on the concourse, identified themselves as federal agents, and asked to see her identification and airline ticket (Tr. 14). Respondent produced her driver's license, which was in the name of Sylvia Mendenhall. Her ticket, however, was issued in the name of "Annette Ford." When asked why the ticket was under a different name, respondent stated that she "just felt like using that name" (Tr. 14). The agents' suspicions were heightened when respondent stated that she had remained in California only two days, which seemed an unusually brief period for a journey of that distance (Tr. 10, 14-15). Agent Anderson then specifically identified himself as a federal narcotics officer, and respondent "became quite shaken, extremely nervous.

She had a hard time speaking" (Tr. 15).[4] Agent Anderson then asked respondent if she would accompany him to the DEA office (which was located less than 50 feet away) for further questioning, and she agreed (Tr. 15, 26). At the office, the agent asked her if she would mind allowing a search of her person and handbag and told her that she had the right to decline the search if she so desired. She responded, "Go ahead" (Tr. 16). She then handed Agent Anderson her purse, which contained a different airline ticket, which had been issued to "F. Bush" three days earlier for a flight from Pittsburgh through Chicago to Los Angeles (Tr. 16). Respondent admitted that this was the ticket on which she had flown to California but gave no reason for using that additional alias (Tr. 16).

A female police officer then arrived to search respondent's person (Tr. 16-17). She asked the agents if respondent had consented to be searched (Tr. 34). The agents said that she had, and respondent followed the policewoman into a private room. There the policewoman again asked respondent if she had consented to the search, and respondent replied that she had (Tr. 34). The policewoman explained that the search would require the removal of respondent's clothing. As respondent removed her clothing, she took a plastic package from her bra, which appeared to contain heroin, and another package, wrapped in

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[4] The entire conversation in the concourse lasted only two or three minutes (Tr. 15).

brown paper, from her underpants, and handed both to the policewoman (Tr. 34-35).[5] The agents then arrested respondent for possessing heroin (Tr. 17).

3. The district court denied respondent's motion to suppress the heroin found on her person (App. C, *infra*, 9a-20a). The court concluded that the agents' action in initially approaching respondent and asking to see her ticket and identification was a permissible investigative stop under the standards of *Terry* v. *Ohio*, 392 U.S. 1 (1968), and *United States* v. *Brignoni-Ponce*, 422 U.S. 873 (1975), because it was based on specific and articulable facts that, in light of the agents' substantial experience,[6] justified a reasonable suspicion of criminal activity and warranted the limited intrusion involved (App. C, *infra*, 13a-16a). The court also found that respondent was not placed under arrest by having been asked to accompany the agents to the DEA's office, that she had done so voluntarily and in a spirit of apparent cooperation, and that she was not arrested until after she had been searched (*id.* at 16a). Finally, the court, specifically crediting Agent Anderson's testimony, found that respondent "gave her consent to the search [in the

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[5] The search took five to ten minutes (Tr. 17).

[6] The court noted (App. C, *infra*, 13a-14a) that Agent Anderson "has had ten years' experience as a federal narcotics agent; that he has attended several training sessions and seminars to prepare him for his duties; that he has been assigned to the airport detail for more than a year and, in the last year alone, has made approximately 100 arrests at the airport."

DEA office] and * * * such consent was freely and voluntarily given" (*ibid.*).[7]

4. A panel of the court of appeals reversed in a judgment order, stating only that "the court concludes that this case is indistinguishable from *United States* v. *McCaleb*, 552 F.2d 717 (6th Cir. 1977)" (App. B, *infra*, 8a).

In *McCaleb*, the court suppressed heroin seized by DEA agents at the Detroit Airport in substantially similar circumstances.[8] The court rejected the gov-

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[7] The court also concluded that, although respondent was not arrested until after she had been searched and the heroin discovered, the agents had probable cause to arrest her before the search. The court outlined all of the facts known to the agents at that time, including the fact respondent had been travelling under two different aliases, and concluded (App. C, *infra*, 18a): "Although each of these facts, in and of themselves, are relatively innocuous and innocent, when all of them are found to coincide, and all of them are known characteristics of airborne drug couriers, they furnish the officer observing them with probable cause. To hold otherwise would be to direct DEA Agents to forget all of their training and experience, to ignore the obvious, and to not use all of the education and investigative know-how which they are required to acquire and cultivate in order to obtain and keep their jobs."

[8] There are a number of differences between the facts in *McCaleb* and the instant case: for example, *McCaleb* involved three suspects travelling together; one of them claimed one suitcase from the luggage claim, and the agent, in asking consent to search the bag and advising them of their right to refuse, also advised them that if consent were refused, he would detain them while he sought a search warrant (552 F.2d at 719). But the salient facts of the two cases are substantially similar—for example, round trips of short duration to Los Angeles, carry-on luggage only, nervous behavior, use

ernment's reliance on the agents' experience and the "drug courier profile" (see note 2, *supra*), holding that the circumstances did not give rise to a reasonable and articulable suspicion justifying the initial approach and request for identification for the reason that "[t]he activities of the appellants in this case observed by DEA agents, were consistent with innocent behavior." 552 F.2d at 720.

The court in *McCaleb* further concluded that even if the initial approach had been permissible, asking the suspects to accompany the agents to a private room for further questioning constituted an arrest requiring probable cause because at that point "appellants * * * were not free to leave [and thus] the arrest was clearly complete." *Ibid.*[9] Finally, the court in *McCaleb* concluded that the consent to search in that case was not voluntary, primarily because of what the court believed to be the unconstitutional nature of the preceding stop and detention. *Id.* at 720-721.[10]

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of aliases, and consents to search—and they present the same general questions of law.

[9] The opinion does not indicate the basis of the court's conclusion that the suspects were not free to leave; it may have been based on the testimony of one of the agents at the suppression hearing that if the suspects had sought to leave, he would have restrained them. Whether the agent's subjective and uncommunicated intent on that matter has any relevance to the legal questions involved is discussed *infra*, page 21.

[10] The court relied for this conclusion on *United States* v. *Bazinet*, 462 F. 2d 982, 989 (8th Cir.), cert. denied, 409

The case was reheard by the court en banc, which reinstated the panel decision, stating simply that the majority was convinced that in this case there was not "valid consent to search within the meaning of [*McCaleb*]" (App. A *infra*, 2a). The court also stated that it should "not * * * attempt to formulate definitive rules. Despite some general similarities, every single case differs from every other in material degree" (*ibid.*).

Judge Weick dissented. He noted that the majority had declined to decide any of the "questions of exceptional importance to be considered in connection with investigations by experienced federal agents of traffic in huge quantities of narcotics flowing into the Detroit airport * * *" (App. A, *infra*, 4a). To the extent the majority relied on principles stated in *McCaleb*, Judge Weick concluded that "it is time to overrule *McCaleb* and its progeny" (*id.* at 6a).[11]

U.S. 1010 (1972), in which the court stated that "the mere fact that a person has been arrested in violation of his constitutional rights casts grave doubts upon the voluntariness of a subsequent consent. The government has a heavy burden of proof in establishing that the consent was the voluntary act of the arrestee and that it was not the fruit of the illegal arrest" (footnote omitted).

[11] The instant case was considered by the en banc court jointly with *United States* v. *Camacho*, No. 78-5081. That case presented many of the same issues as this one and was disposed of by the court of appeals in the same manner. We are not seeking review of the decision in *Camacho* because of the presence of certain additional factual circumstances that cast doubt upon the voluntariness of the consent to search in that case.

REASONS FOR GRANTING THE PETITION

This case presents questions of exceptional importance to a major and highly successful law enforcement program.[12] As noted in the Statement (page 2, *supra*), the DEA's airport surveillance program now operates in more than 20 cities. Its success in interdicting the flow of narcotics is documented not only in Judge Weick's dissent (App. A, *infra*, 4a n.1) but also by the numerous reported decisions considering suppression claims arising out of its operation (see note 1, *supra*).[13] By seeking to intercept

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[12] We believe that the questions we present are also of general importance to the conduct of police investigations in a wide variety of contexts. We focus here upon their special importance to the airport surveillance program because that is the context in which the court of appeals decided them and because it is not certain to what extent the standards articulated in *McCaleb* would be applied by that court in other contexts.

[13] The operation and success of the Detroit airport program is most fully described in the opinion of the district court in *United States* v. *Van Lewis*, 409 F. Supp. 535 (E.D. Mich. 1976), aff'd, 556 F. 2d 385 (6th Cir. 1977), issued following an extensive suppression hearing. The court described the background and operation of the program and the development and use of the profile. It also found (409 F. Supp. at 539) that since the initiation of the program, "agents have searched 141 persons in 96 airport encounters [*i.e.*, encounters where a search ensues] prompted by their use of the courier profile and independent police work. * * * Agents found controlled substances in 77 of the 96 encounters and arrested 122 persons for violations of the narcotics laws." Further data demonstrating the high success rate of the program and the reliability of the courier profile was developed in the suppres-

the movement of substantial quantities of illicit drugs from the importers to their customers, the retail distributors, the basic method and objective of the program is a significant departure from and complement to more traditional methods of narcotics law enforcement, such as searches and seizure at the point of importation or operations directed at the detection of retail (or "street") sales by means of informants and undercover purchases.

The operation of the airport surveillance program typically involves—as it did in this case—three principal and recurring features: (1) the initial contact with the suspect for questioning and identification, based in large part on characteristics and patterns of behavior that the agents, through their collective experience, have learned to associate with drug couriers; (2) a request that the suspect move from the public areas of the terminal to a nearby office if the agents believe that further questioning is appropriate; and (3) a request in the office for a consent to search the suspect's effects or person. The legal standards established by the Sixth Circuit in *United States* v. *McCaleb*, 552 F.2d 717 (1977), and relied on by the en banc court in this case, if correct, mean that the relatively standard practices developed and

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sion hearing in *United States* v. *Camacho* and presented to the court of appeals in our petition for rehearing in this case and *Camacho* (C.A. App. in No. 78-5081 at 44-46). Some of those statistics are set forth in Judge Weick's dissent, App. A, *infra*, 4a n.1.

followed by DEA in each of these three phases of the airport surveillance program, which are believed to contribute significantly to its successful operation, are unconstitutional.

As we explain more fully below, the legal standards set forth in *McCaleb* are in direct conflict with the decisions of other circuits and with general Fourth Amendment principles delineated by this Court. Even if we are wrong on the merits, however, the issues are important and recurring; they warrant this Court's plenary review in order to provide needed guidance to law enforcement agencies like DEA in the structuring of their programs and in the training and supervision of their agents.

Corresponding to the three principal features of the airport surveillance program, the decision below and in *McCaleb* present three distinct legal questions: (1) whether law enforcement officers may, on the basis of observation of articulable facts that in their experience suggest criminal activity but that are "consistent with innocent behavior" (*McCaleb*, *supra*, 552 F.2d at 720), approach an individual in a public place to ask questions and request production of identification; (2) whether requesting a suspect to go to a nearby office for further questioning converts a permissible investigative stop into an arrest that is invalid unless supported by probable cause; and (3) whether an unlawful stop or arrest normally precludes a valid consent to search, even when the suspect has been advised of the right to refuse con-

sent. We submit that the court below decided each of those questions incorrectly.

1. In *Terry* v. *Ohio*, 392 U.S. 1 (1968), and subsequent cases, this Court has established that police officers may briefly detain a person for investigative purposes if they can point to specific facts that are reasonably indicative of possible criminal activity but that do not amount to probable cause—*i.e.*, facts that support a reasonable suspicion, but not necessarily a reasonable conclusion, of criminality. See *Terry, supra*, 392 U.S. at 20-27; *Adams* v. *Williams*, 407 U.S. 143, 146-149 (1972); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 880-882 (1975). The proper consideration, as the Court stated in *Terry*, is whether an officer is "able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion" (392 U.S. at 21; footnote omitted). The lawfulness of the detention thus depends on considerations both of the facts supporting the suspicion and of the degree and purposes of the intrustion. See also *Delaware* v. *Prouse*, No. 77-1571 (March 27, 1979), slip op. 5.

Contrary to the implication of the court of appeals' opinion (App. A, *infra*, 2a), this case involves more than simply the application of settled legal principles to the varying facts of particular cases. Rather, the court's holding here and in *McCaleb* with regard to the lawfulness of the initial encounter turn upon several general propositions that have the effect

of severely curtailing, in a large class of cases, the investigative activities of law enforcement officers.

a. In *McCaleb* (and presumably in this case), the court of appeals found no reasonable suspicion warranting the initial approach to the suspects, relying on the ground that their observed behavior could be said to be "consistent with innocent behavior." 552 F.2d at 720. The proposition of law indicated by that holding is, we submit, plainly incorrect; it finds no support in *Terry* or, to our knowledge, any other case, and it has been expressly rejected by the Second Circuit. *United States* v. *Price*, No. 78-1386 (May 18, 1979), slip op. 2671. Virtually *any* set of facts can be said to be consistent with some hypothesis of innocent behavior, even if the facts would indicate an extremely high likelihood of criminal activity to a person of reasonable caution. Not even the reasonable doubt standard imposes such a stringent criterion on the fact-finder,[14] to say nothing of the progressively more relaxed standards of probable cause and reasonable suspicion. Certainly the facts warranting reasonable suspicion and justifying the intrusions in *Terry* and in *Adams* v. *Williams*, 407 U.S. 143 (1972), could be said to have been consistent with an hypothesis of innocent behavior. See *Terry* v. *Ohio*, *supra*, 392 U.S. at 22.

It is difficult to imagine that the Sixth Circuit in this case and in *McCaleb* understood *Terry* to re-

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[14] See *Holland* v. *United States*, 348 U.S. 121, 139-140 (1954).

quire virtual certainty of criminality before an investigative stop is warranted. If not, however, it is impossible to deduce what else the "consistent with innocent behavior" standard does mean, particularly in view of the court's unwillingness to amend or clarify that standard in *McCaleb* and in this case.[15] In the absence of this Court's review, agents and district courts in the Sixth Circuit will lack any meaningful guidance with respect to the lawfulness of particular actions performed in the course of the surveillance program.

b. It is almost as difficult to deduce the court of appeals' view of the relevance in these cases of the set of common drug courier characteristics that the agents have collectively developed in their extensive experience—referred to popularly and by the court as the "drug courier profile." The court seems to regard reliance by the agents on these characteristics in initiating an encounter as largely irrelevant and possibly improper.[16] If so, we can see no rational

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[15] It is possible that the court meant to say that reasonable suspicion cannot exist if the observed behavior is more consistent with innocence than it is with criminality. If so, it would be incorrect, because that would define "reasonable suspicion" in terms of the standard for probable cause. See, *e.g.*, *Adams* v. *Williams*, *supra*, 407 U.S. at 148; *Beck* v. *Ohio*, 379 U.S. 89, 91 (1964).

[16] In both *McCaleb* (552 F. 2d at 720) and the en banc decision in this case, the court stated that "the so-called drug courier profile does not, in itself, represent a legal standard of probable cause in this Circuit" (App. A, *infra*, 2a). In *McCaleb* the court went on to state that "while a set of facts may arise in which the existence of certain profile characteristics constitutes reasonable suspicion, the circumstances of this case do not * * *." 552 F. 2d at 720. See also App. A,

basis for that view. In deciding whether to detain a person for questioning it seems to us plainly appropriate—indeed commendable—for an agent to rely not only on his own experience but also on the collective experience of his colleagues and predecessors.[17]

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infra, 2a. What is meant is not clear, but in finding no reasonable suspicion in both cases—despite a substantial correspondence of observed traits with profile characteristics—the court appears to have concluded that such coincidence is largely irrelevant and should be disregarded. See also *United States* v. *Van Lewis*, 556 F. 2d 385, 389 (6th Cir. 1977) ("the profile is too amorphous to be integrated into a legal standard"); *United States* v. *Ballard*, 573 F. 2d 913, 916 (5th Cir. 1978) (coincidence with the profile, without more, cannot justify an investigative stop).

We believe that view is incorrect. It is true that the reasonableness of each stop must be measured by the totality of the observed facts and that the coincidence of those facts with profile characteristics does not necessarily make the stop reasonable (*e.g.*, if other facts negate the reasonableness of the inferences)—and we have never suggested otherwise. But it is equally true that a high coincidence between observed facts and profile characteristics does not necessarily make the stop unreasonable or justify disregarding that coincidence, which is what the Fifth and Sixth Circuits have apparently suggested.

[17] As the district court indicated (App. C, *infra*, 18a), the value of collective experience is the very premise of education and training.

While, as we have noted (note 16, *supra*) the court of appeals' view of the profile is unclear, it is possible that the court misunderstood the nature and function of the profile, the development and use of which is described in *United States* v. *Van Lewis*, *supra*, 409 F. Supp. at 538-539. As a factual matter, there is no national profile; each airport unit has developed its own set of drug courier characteristics on the basis of that unit's experience. While many of the salient characteristics are common to the guidelines of

See, *e.g.*, *United States* v. *Brignoni-Ponce*, *supra*, 422 U.S. at 884-885, where the Court clearly indicated that the collective experience of Border Patrol officers would be highly relevant to the reasonableness of particular vehicle stops. See also *United States* v. *Price*, *supra*, slip op. 2666-2670; *United States* v. *Oates*, 560 F.2d 45, 61 (2d Cir. 1977); but cf. *United States* v. *Ballard*, 573 F.2d 913, 915-916 (5th Cir. 1978); *United States* v. *Cortez*, No. 77-1987 (9th Cir. April 19, 1979). The decision below and in *McCaleb* raises substantial questions about the utility, if not the propriety, of this important law enforcement device, and the need to resolve those questions is a further reason why this Court's review is appropriate.

c. The analysis of the court of appeals also appears to ignore entirely the question whether the amount of suspicion necessary to justify a particular police-citizen encounter varies with the intrusiveness

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most, if not all units, there are some differences based on the particular experiences of different units and the peculiar characteristics of each airport. Furthermore, the profile is not rigid, but is constantly modified in light of experience.

The basic purpose of the profile is to inform, but not to serve as a substitute for, the agents' judgment in particular circumstances. Similar profiles have been developed to assist in the detection of potential air pirates, or "skyjackers", and their use has been widely noted and approved. See *United States* v. *Edwards*, 498 F. 2d 496 (2d Cir. 1974); *United States* v. *Palazzo*, 488 F. 2d 942 (5th Cir. 1974); *United States* v. *Cyzewski*, 484 F. 2d 509 (5th Cir. 1973), cert. dismissed, 415 U.S. 902 (1974); *United States* v. *Doran*, 482 F. 2d 929 (9th Cir. 1973).

of the encounter. It is arguable that the initial encounter between the DEA agents and respondent in this case was not even a "seizure" of her person within the meaning of the Fourth Amendment.[18] But assuming that it was, it surely must rank among the least intrusive of the range of such encounters that would require Fourth Amendment scrutiny. Accordingly, in our view, relatively little in the way of reasonable suspicion should be required to sustain the validity of the agents' limited action.

By its failure to accord proper weight to this consideration, as well as by its adoption of unduly onerous standards for determining what constitutes reasonable suspicion, the court of appeals has severely impaired the effectiveness of the critical first step in an important law enforcement program that has heretofore made significant strides in interdicting the distribution of narcotics.

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[18] In *Terry* v. *Ohio, supra,* 392 U.S. at 19 n.16, this Court stated: "Obviously, not all personal intercourse between policemen and citizens involves 'seizures' of persons. Only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen may we conclude that a 'seizure' has occurred." At least one circuit has concluded, specifically in the airport surveillance context, that the initial encounter and request for identification does not constitute a seizure. See *United States* v. *Elmore,* No. 78-5304 (5th Cir. May 22, 1979). See also *United States* v. *Price, supra* (noting but reserving the question). Other courts have reached the same conclusion in similar contexts. See *United States* v. *Wylie,* 569 F. 2d 62, 68 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978); *United States* v. *Brunson,* 549 F. 2d 348, 357 (5th Cir.), cert. denied, 434 U.S. 842 (1977) (collecting cases).

2. The court in *McCaleb* concluded that even if an initial stop meets *Terry* standards, the agents' request that the suspect accompany them to a nearby private room converts the stop into an arrest requiring probable cause, because at that point the suspects "are not free to leave * * *." 552 F.2d at 720.

That conclusion, which is also of critical importance to the success of the airport surveillance program, is in conflict with decisions of the Ninth and Second Circuits, which have considered the issue specifically in this context. *United States* v. *Chatman*, 573 F.2d 565, 567 (9th Cir. 1977); *United States* v. *Oates*, *supra*.[19]

The Sixth Circuit's holding on this point is incorrect in several respects. First, whether or not a detained individual is free to leave manifestly cannot be the test for distinguishing a *Terry* stop from an arrest (or detention)[20] requiring probable cause,

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[19] See also *United States* v. *Salter*, 521 F. 2d 1326, 1328-1329 (2d Cir. 1975); *United States* v. *Richards*, 500 F. 2d 1025, 1027-1029 (9th Cir. 1974), cert. denied, 420 U.S. 924 (1975). Other circuits have reached the same conclusion in similar contexts. See *United States* v. *Short*, 570 F.2d 1051, 1054 (D.C. Cir. 1978); *United States* v. *Wylie*, 569 F. 2d 62, 70 (D.C. Cir. 1977), cert. denied, 435 U.S. 944 (1978); *United States* v. *Gibson*, 392 F. 2d 373, 376 (4th Cir. 1968).

[20] The term "arrest" has been used in a number of different ways. Usually it refers to the formal act by which a person is charged with an offense and taken into custody for that offense. It is often used, however, to refer to that degree of detention that goes beyond a *Terry* stop and that requires probable cause, although that may not entail a formal charge against the detainee or the element of extended deprivation of liberty.

since the kind of investigative stop authorized by *Terry* and other cases also presumes some restraint on liberty amounting to a "seizure" of the person. Second, to the extent the Sixth Circuit's view is based on the subjective but uncommunicated intent of the agents, it is incorrect because subjective intent is not the appropriate standard for determining Fourth Amendment violations, as *Terry* itself makes clear. 392 U.S. at 21-22. See also *Scott* v. *United States*, 436 U.S. 128, 136-137 (1978).[21] Third, there is in our view no sound basis for concluding that removing a suspect from the public areas of a terminal to a nearby office for further brief questioning is automatically an unreasonable incident to a stop under the rationale of *Terry*.[22] Finally, there is no basis in this record for overturning the district court's finding that respondent was not directed to the DEA office, but simply asked if she would go there, and that she willingly complied in a spirit of apparent cooperation. In any event, DEA agents need guid-

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[21] See also *United States* v. *Oates*, *supra*, 560 F. 2d at 58; *United States* v. *Wylie*, *supra*, 569 F. 2d at 69 n.7; *United States* v. *Grandi*, 424 F. 2d 399, 401 (2d Cir. 1970), cert. denied, 409 U.S. 870 (1972); *Coates* v. *United States*, 413 F. 2d 371 (D.C. Cir. 1969); *Lowe* v. *United States*, 407 F. 2d 1391, 1397 (9th Cir. 1969).

[22] Moreover, the court of appeals gave no apparent consideration to the significant fact that respondent had shown the agents that she had been travelling under an alias before they asked her to accompany them to the DEA office—a fact that substantially increased their suspicion and indicated the appropriateness of further questioning.

ance on the validity of this aspect of the program as well, which the court below has declined to provide.[23]

3. Finally, the decisions in this case and in *McCaleb* reflect the proposition that a consent to search normally cannot be valid if the preceding detention is impermissible. Since in this case it is difficult to imagine how respondent could have more clearly manifested her consent (having, as the district court found, willingly accompanied the agents to the office and then twice expressed consent to a search of her person and effects after being told of her right to refuse), it would seem to follow that the court of appeals believed that a valid consent can never be given when the preceding detention is for some reason impermissible. And because the court has effectively held unlawful DEA's standard procedures for investigative detention, the court's conclusion with respect to the consent issue provides agents with little, if any, means for the successful implementation of the program.

The Sixth Circuit's conclusion on the consent issue is, again, in conflict with the decision of at least one other circuit, which has upheld the validity of con-

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[23] The validity of requiring a suspect to go to the police station for questioning is before this Court in *Dunaway* v. *New York*, No. 78-5066, argued March 21, 1979. If the State prevails in *Dunaway*, the propriety of the requiring a suspect to move a brief distance out of a crowded airport area to a nearby office would follow. But even if petitioner prevails in *Dunaway*, the substantially lesser intrusion involved in this case remains reasonable in our view.

sents in the course of airport detentions found or assumed to be impermissible. See *United States* v. *Troutman*, 590 F.2d 604 (5th Cir. 1979).[24] We believe that it is also in conflict with the standards set forth in *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). See also *United States* v. *Watson*, 423 U.S. 411, 425 (1976) (Powell, J., concurring). This question also merits this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

PHILIP B. HEYMANN
Assistant Attorney General

RICHARD A. ALLEN
Assistant to the Solicitor General

JOHN LOFTUS
DEBORAH WATSON
Attorneys

JUNE 1979

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[24] See also *United States* v. *Fike*, 449 F. 2d 191 (5th Cir. 1971), *Bretti* v. *Wainwright*, 439 F. 2d 1042 (5th Cir.), cert. denied, 404 U.S. 943 (1971), upholding consents in similar, non-airport contexts.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Nos. 78-5064, 78-5081

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SYLVIA L. MENDENHALL and DAVID A. CAMACHO, DEFENDANTS-APPELLANTS

Appeals from the United States District Court for the Eastern District of Michigan, Southern Division

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Decided and Filed April 6, 1979

Before: EDWARDS, Chief Judge, WEICK, CELEBREZZE, LIVELY, ENGEL, and KEITH, Circuit Judges, sitting en banc.*

EDWARDS, Chief Judge and CELEBREZZE, LIVELY, ENGEL, and KEITH, Circuit Judges, joined in a Per Curiam Opinion. WEICK, Circuit Judge, (pp. 3-6) filed a separate dissenting opinion.

PER CURIAM. On petition filed by the United States, this court, on January 12, 1979, vacated the decisions in No. 78-5064, *United States* v. *Sylvia L. Mendenhall*, and No. 78-5081, *United States* v. *David A. Camacho*, and scheduled arguments on both before

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* Judge Merritt recused himself from this hearing.

the court en banc. The cases have now been briefed and orally argued before the full court.

On careful review of the records, and the authorities cited to us in the Supreme Court and the Courts of Appeals, we now conclude that the panel decisions in both *Mendenhall* and *Camacho* should be and are hereby reinstated.

Our review of the facts in both of these cases convinces the majority of this court that in neither case was there valid consent to search within the meaning of *United States* v. *McCaleb*, 552 F.2d 717 (6th Cir. 1977). We also hold that the so-called drug courier profile does not, in itself, represent a legal standard of probable cause in this Circuit. We recognize, of course, that the drug enforcement agency's employment of this profile in educating its officers as to what conduct to look for in relation to drug couriers is a perfectly valid law enforcement device.

Examination of these records and re-examination of precedent in these airport drug search cases in this and other Appellate Courts have led to our decision not to attempt to formulate definitive rules. Despite some general similarities, every single case differs from every other in material degree.

In view of our en banc decision set forth above, we now reverse our preceding denial of bail to Mendenhall and Camacho and remand these cases to the District Court for determination of an appropriate bond pending petitions for writ of certiorari.

WEICK, Circuit Judge, Dissenting. I respectfully dissent. En banc consideration of the present appeals

was ordered so that we could re-examine and reconsider our decision in *McCaleb*, which has been under continuous attack by the Government in an increasing number of narcotics cases coming from traffic in drugs at Detroit's Metropolitan Airport.

Important questions of law are involved in connection with investigations of drug traffic at the airport, such as the right of federal agents to stop and question suspects where such agents have reasonable grounds to believe that the suspects are engaged in narcotics transactions; and such questions as: Where the agents by their questions learn that the suspects are traveling under assumed names, and are acting in a suspicious manner, may they request that the suspects accompany them to a private room at the airport in order to comply with airport regulations designed to prevent confrontation in public areas and possible resulting injury to the public? and Where the suspects consent to accompany the officers to the private room, is such consent, or their consent in the private room to a search, coercive *per se*?

After receiving supplemental briefs filed by the parties and hearing oral arguments, the en banc majority, consisting of only five of the six Judges constituting the en banc Court (our normal complement is nine Judges and two more judgeships are provided in the recent Bill passed by Congress) summarily disposed of the appeals by a simple two-page per curiam order without deciding any of the important questions of law involved, which were the very reasons for granting en banc consideration.

It was suggested by a colleague that we withhold decision to await the determination by the Supreme Court of similar questions of law in pending "stop and frisk" cases, but such suggestion was not followed by the en banc majority. The similar cases in which the Supreme Court granted certiorari, heard oral arguments in one of them, and fixed the time for oral arguments in another, are as follows: *Delaware* v. *Prouse*, No. 77-1571 (heard January 17, 1979); *Michigan* v. *DeFillippo*, No. 77-1680, 47 U.S.L.W. 3053 scheduled during weeks of February 23 and 26 (one hour); *Brown* v. *Texas*, No. 77-6673.

The Government, in its petition for rehearing en banc, points out questions of exceptional importance to be considered in connection with investigations by experienced federal agents of traffic in huge quantities of narcotics flowing into the Detroit airport, principally from Los Angeles, San Diego, Miami, and New York.[1]

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[1] The amount and type of illegal narcotics seized at the Detroit Metropolitan Airport are as follows:

	1975	1976	1977	1978
Heroin	41.1 lbs.	66 lbs.	14.5 lbs.	10 lbs.
Cocaine	5.1 lbs.	7 lbs.	5.3 lbs.	4.8 lbs.
Phencyclidine	15 lbs.	5.5 lbs.	3 ozs.	1 lb.
Marijuana	794 lbs.	189.5 lbs.	347.8 lbs.	47.5 lbs.
LSD	6,000 dosage units		11,000 dosage units	
Hashish	5.8 ozs.		8 ozs.	
Amphetamines	41 grams			
Methamphetamines			29 ozs.	
Dangerous Drugs	93 grams		2,000 dosage units	1,536 dosage units

[p. 2, Petn for rehearing en banc]

The investigations involve persons who, in the trained mind of experienced federal agents, are regarded as suspicious. Usually such persons are traveling between distant places, without luggage or with little luggage, and are looking around and appear to be nervous. The agent will stop such a person in the airport, identify himself, ask the suspect for identification, and ask to see his plane ticket.

When identification has been made the agent usually discovers that the suspect is traveling under an assumed name. The plane ticket may also reveal stop-offs at a place or places other than Detroit. Sometimes the suspect is seen in the presence of a known narcotics dealer. The agent will then invite the suspect to accompany him to a private room in the airport. The reason is that the agent must comply with airport regulations which are designed to prevent public confrontation and injury which may result therefrom. When they arrive at the room the agent then asks the suspect for permission to search him. If consent is given, such consent ought not be vitiated by an appellate court where the District Court has found the consent to be voluntary, in the absence of a finding by the appellate court that the District Court's finding is not supported by substantial evidence. Where consent is not given, the agent would have the right to arrest and search, if he has probable cause to do so.

In the present appeals each District Judge hearing the case granted an evidentiary hearing on a motion to suppress evidence, and held that the federal agents

had reasonable grounds to stop and question the defendants, that defendants acquiesced in following the agents to the private room, and that consent to the search was either given voluntarily or that the agents had probable cause to arrest and search. The District Judges who presided in the present cases were the Honorables Ralph B. Guy, Jr. and Robert E. DeMascio, both able jurists with extensive experience in the trial of cases in the Eastern District of Michigan.

The en banc majority, relying on *McCaleb*, reverses the judgments of the District Judges without specifically finding that the District Judges' findings of fact on the issues of reasonable grounds to stop and question, acquiescence in following the agents to the private room, and probable cause to arrest and search or voluntary consent to the search, were not supported by substantial evidence, and are clearly erroneous, and that their conclusions of law are incorrect.

Apparently the en banc majority regard *McCaleb* as holding that the facts are *per se* coercive. If this is so, it is time to overrule *McCaleb* and its progeny. The *McCaleb* opinion also regards circumstances (which to the trained mind of the federal agents are regarded as suspicious), as such that they may be treated as innocent by an appellate court.

With the ever increasing traffic in narcotics causing so much damage and injury to the public, we ought not sanction a set of rules which hamstring the federal officers in making legitimate investigations. It is also noteworthy that the investigations

in each of the present cases, as in many others, produced real results. The defendants were couriers of narcotics.

I would affirm the judgment of conviction in each appeal.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 78-5064

[Filed Oct. 20, 1978]

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

SYLVIA MENDENHALL, DEFENDANT-APPELLANT

ORDER

BEFORE: WEICK, LIVELY and MERRITT, Circuit Judges.

Upon consideration of the briefs and oral arguments of counsel together with the record and transcript the court concludes that this case is indistinguishable from *United States* v. *McCaleb*, 552 F.2d 717 (6th Cir. 1977).

Accordingly, the judgment of the district court is reversed.

ENTERED BY ORDER OF THE COURT

/s/ John P. Hehman
Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Criminal No. 6-80208

UNITED STATES OF AMERICA, PLAINTIFF

v.

SYLVIA L. MENDENHALL, DEFENDANT

MEMORANDUM AND ORDER

The Drug Enforcement Administration (DEA) has a continuing narcotic detection program whereby its agents observe flights arriving at Detroit Metropolitan Airport from cities around the country that are known to be primary source cities for contraband narcotics. On February 10, 1976, as a part of this program, DEA Agent Anderson was stationed so that he could observe passengers deplaning from American Airlines Flight 218 arriving from Los Angeles, California, a primary source city for Mexican heroin. He was assigned to detect possible couriers of illicit drugs. After stopping defendant, Agent Anderson accompanied her to the airport DEA office and conducted a search. As a consequence of his observation and actions on that day, defendant

was indicted for possession with intent to distribute approximately 250 grams of heroin in violation of 18 U.S.C. § 841(a)(1). Defendant has filed a motion to suppress the seized heroin, alleging that the agent did not have a reasonable suspicion, based upon articulable facts, to justify the investigative stop; that the agent lacked probable cause to arrest her; that she did not consent to a search; and that, if she did consent to the search, she did not freely and voluntarily do so.

At the suppression hearing, Agent Anderson testified that, as he observed deplaning passengers from Flight 218, the defendant attracted his attention because she was the last passenger to deplane. Agent Anderson further testified that his experience has taught him that drug couriers deplane last to obtain a clear view of the area inside the terminal, unobstructed by a crowd. He testified that defendant carefully looked about the entire area in a nervous manner as she deplaned as if she were trying to detect police in the terminal area. Because of these facts, Agent Anderson decided to place the defendant under surveillance. The defendant proceeded down the concourse to the baggage claim area but did not claim any luggage. Agent Anderson's suspicions were aroused when he saw that defendant, after taking a long journey, did not stop for luggage. Defendant then took an escalator to the main complex and went to the ticket counter of Eastern Airlines; Agent Anderson continued to follow her to the ticket counter and stood in line behind her. He

was able to observe the defendant present her ticket to the ticket agent and ask for a ticket from Detroit to Pittsburgh, Pennsylvania. Agent Anderson testified that he could see that the ticket defendant handed to the ticket agent was a valid ticket showing an itinerary from Los Angeles to Detroit to Pittsburgh. This intensified Agent Anderson's suspicion because it became obvious to him that defendant was attempting to change airlines to continue her journey to Pittsburgh even though she possessed a valid ticket to the same destination. This further aroused Agent Anderson's suspicions because he testified he had learned through his experience that illicit drug couriers from a primary source city often change airlines to confuse anyone who may know that they are to arrive at a specific time or via a specific airline and to further conceal their arrival from a primary source city. Agent Anderson further testified that the agent at the Eastern Airlines counter told defendant that her ticket was good for her flight to Pittsburgh and that all she needed was an Eastern Airlines boarding pass, which was provided to her. The defendant then headed for the Eastern Airlines boarding area. At this time, Agent Anderson stopped the defendant, identified himself as a federal agent and asked the defendant for identification. The defendant produced an Ohio driver's license that showed her name to be Sylvia Mendenhall. Agent Anderson then requested to see the defendant's airlines ticket. She produced an American Airlines ticket issued in the name of Annette Ford. The agent

asked the defendant why her ticket was in that name while her identification showed her name as Mendenhall. Defendant responded that she felt like using the name Annette Ford. Agent Anderson stated that when he identified himself as a federal narcotics agent, the defendant became extremely nervous and had great difficulty placing her identification back into her purse; he then asked the defendant if she would accompany him to the airport DEA Office for further questioning. She did so.

Upon arrival at the DEA Office, Agent Anderson asked the defendant if she would consent to a search of her person and handbag and informed her that she had a right to refuse to be searched. Agent Anderson testified that the defendant thereupon consented to the search. Upon examining her purse, he found a ticket issued to F. Bush for a flight to California three days previous. He then requested a woman police officer from the airport security force to assist in a search of defendant's person. This female officer, Beverly Mersier, accompanied defendant to an adjoining room, where she again asked the defendant if she was consenting to the search. Officer Mersier testified that defendant replied that she had consented to the search. Officer Mersier further testified that defendant began to remove her clothing and that it was at this time that defendant removed a plastic bag containing a brown substance from her brassiere and handed it to Officer Mersier. As she began to further disrobe, defendant handed Officer Mersier another plastic bag which she had extracted

from her undergarments. Officer Mersier then handed the two plastic bags to Agent Anderson, who was waiting in an adjoining room. Upon these facts, the government contends that the initial stop was founded upon reasonable suspicion, that defendant was not placed under arrest until after the search resulted in the discovery of alleged narcotics on defendant's person, that defendant freely and voluntarily consented to the search after being informed that she had the right to refuse to give such consent, and that the evidence found as a result of the search should not be suppressed because it was legally obtained.

A law enforcement officer may approach a suspicious individual for investigative purposes when the officer's observations, coupled with his experience and training, give him a reasonable suspicion that a person is engaging in criminal activity. In order to justify such an intrusion, however, the officer must "be able to point to specific and articulable facts which, taken together with rational inferences from those facts, reasonably warrant that intrusion." *Terry* v. *Ohio*, 392 U.S. 1, 21 (1968). In determining the reasonableness of the investigative stop, if is proper for the court to take into account the officer's experience, training and knowledge. 392 U.S. at 30.

We have concluded that Agent Anderson's investigative stop of the defendant was a justifiable intrusion. Agent Anderson testified that he has had ten years' experience as a federal narcotics agent;

that he has attended several training sessions and seminars to prepare him for his duties; that he has been assigned to the airport detail for more than a year and, in the last year alone, has made approximately 100 arrests at the airport. Additionally, Agent Anderson was able to testify to several articulable facts that gave rise to a reasonable suspicion on his part that the defendant was engaging in criminal activity: the defendant was arriving from a flight originating in a primary source city for narcotics entering the Detroit area; she engaged in a common tactic of illegal drug carriers, namely, remaining in the aircraft so as to be the last passenger to deplane; when she did deplane, she nervously scanned the entire area as though she were attempting to locate anyone who might be observing deplaning passengers. At this point Agent Anderson acted properly by merely placing her under surveillance. The results of his surveillance produced additional facts that justify the initial investigative stop. He observed that the defendant did not attempt to claim any luggage, although she had presumably just completed a long journey. The agent knew from his experience that drug couriers carry little or no luggage, *See United States* v. *Van Lewis*, 409 F.Supp. 535, 538 (E.D. Mich. 1976), and then his suspicions were further confirmed when, standing behind the defendant at the Eastern Airlines ticket counter, he observed that she did indeed arrive from Los Angeles, a major drug import center. Finally, Agent Anderson observed that defendant was switching airlines

to reach a destination for which she was already ticketed. We conclude that when all of these factors —flight from a source city, last passenger to deplane, the nervous scanning of the entire airport area, apparent lack of luggage although coming from a great distance, the changing of airlines without apparent justification even though in possession of a valid ticket to the same destination—are found to coincide, a *Terry* type intrusion in order to determine defendant's identity and obtain more information is justified. *See Terry* v. *Ohio, supra*; *Adams* v. *Williams*, 407 U.S. 143, 146 (1972).

The agent's action, in asking defendant to show him some identification and her airline ticket, was "reasonably related in scope to the circumstances which justified the interference in the first place." *Terry, supra*, 392 U.S. at 20, *see also United States* v. *Brignoni-Ponce*, 442 U.S. 873, 881 (1975), *citing Terry, supra*, 392 U.S. 1, 29. It constituted an appropriate manner of investigating defendant's suspicious activity further. The airline ticket that defendant produced, rather than dispelling the agent's suspicions, *see Terry, supra*, 392 U.S. at 28, only served to heighten them—it demonstrated that defendant was traveling under an alias, a known tactic of illegal drug couriers, *see United States* v. *Van Lewis, supra*, 409 F.Supp. at 538. Nor did defendant's unsatisfactory explanation that "she felt like using that name" allay the agent's heightened suspicions that she was engaged in criminal activity. Thus, the agent properly sought to continue his in-

vestigation by requesting that defendant voluntarily accompany him to the DEA Office at the airport. The court finds that defendant did so accompany Agent Anderson to the airport DEA Office "voluntarily in a spirit of apparent cooperation with the [agent's] investigation", *Sibron* v. *New York*, 392 U.S. 40, 63 (1968), and that she was not placed under arrest at some time prior to the conclusion of the search.[1]

The defendant contends that she did not consent to the search, and that even if she did, such consent was not freely and voluntarily given. The testimony of Agent Anderson and Officer Mersier, which the court finds credible, is to the contrary. Both testified that defendant gave her consent to the search and the court finds that such consent was freely and voluntarily given. *Schneckloth* v. *Bustamonte*, 412 U.S. 218 (1973). The evidence, then, was discovered after

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[1] The court finds that defendant was not placed under arrest at any time prior to the conclusion of the search, notwithstanding Agent Anderson's testimony that he would have compelled defendant to accompany him had she not voluntarily agreed to do so. This subjective viewpoint of the agent is not controlling—it was not communicated to the defendant and she was not of the view that she was not free to go. *See* W. LaFave, *"Street Encounters" and the Constitution: Terry, Sibron Peters and Beyond*, 67 Mich.L.Rev. 39, 63n. 117, 101-05 (1968). Moreover, if the court relied on Anderson's subjective view to determine whether and when an arrest occurred, the effect would be to suppress the evidence, since no probable cause existed at this point in time. However, to do so would only punish the agent for that which he would have done had defendant elected to not voluntarily accompany him. The court will not subscribe to such an absurd result.

a legal stop and a consensual search and not as a product of an illegal stop, an arrest (legal or illegal) or a nonconsensual search. As such, defendant's motion to suppress the evidence must fail. Moreover, the court notes that, although Agent Anderson did not arrest defendant until the search of her person was concluded, he possessed probable cause to effect her arrest prior to his summoning of Officer Mersier. When the agent saw the contents of defendant's purse and found the second airline ticket, he was apprised of the following facts: defendant had been in Los Angeles, a known primary source city for contraband narcotics; she had deplaned last, a known tactic of illegal drug couriers, utilized so as to gain a clear view of the terminal upon exiting the plane; she had nervously scanned the area as if she were trying to spot anyone who might be watching her and the deplaning throng, a common mannerism among drug couriers; she did not have any baggage, although she had been on a long distance journey (also known to be a common identifying habit of drug couriers); she had effected a switch in airlines to a destination for which she already possessed a valid ticket (Agent Anderson testified that he had learned, in the course of his experience and training as a DEA Agent, that drug couriers often switch airlines to cover their trial [*sic*] and to confuse anyone who might be attempting to follow them or place them under surveillance); defendant was traveling under an alias, a common tactic of illegal drug couriers; defendant had traveled to Los Angeles, a pri-

mary source city, three days previous to her landing at the airport in Detroit, and travel to and from primary source cities is a characteristic of drug couriers; she had traveled to Los Angeles under yet another alias; she was ostensibly from Cleveland, but was flying a circuitous route if she were homebound (thus, possibly setting up an innocent-looking route home from Pittsburgh—if anyone were to check on her arrival in Pittsburgh, they would see that she had arrived on a flight originating in Detroit, not Los Angeles, because of the airline switch); and she offered no satisfactory explanation of any of these circumstances. Although each of these facts, in and of themselves, are relatively innocuous and innocent, when all of them are found to coincide, and all of them are known characteristics of airborne drug couriers, they furnish the officer observing them with probable cause. To hold otherwise would be to direct DEA Agents to forget all of their training and experience, to ignore the obvious, and to not use all of the education and investigative know-how which they are required to acquire and cultivate in order to obtain and keep their jobs.

The defendant did not appear at the time and date scheduled for the evidentiary hearing on her motion to suppress. Defendant's counsel sought to adjourn the suppression hearing and objected to the court proceeding in the absence of the defendant. Counsel contends that the defendant had a right to be present at the suppression hearing. We have concluded, however, that the right to be present at a suppression

hearing is waived by a voluntary absence. *United States* v. *Dalli*, 424 F.2d 45, 48 (2d Cir. 1970). This is especially true in the circumstances of this case. Upon defendant's representations that she was having a pregnancy-related problem, we granted prior adjournments of the suppression hearing. On July 26, 1976, the court scheduled the hearing for August 23, 1976; on July 28, 1976, the defendant's counsel requested an adjournment of the hearing until August 30, 1976, which was granted; on August 23, 1976, defendant's counsel again requested that the hearing be adjourned until September 27 which was also granted; finally, at defendant's counsel's request the parties stipulated to a date certain, October 18, 1976, on which date the hearing proceeded. This latter adjournment necessitated adjourning the trial date.

Defendant's counsel has now represented to the court that she advised the defendant of the date for her suppression hearing. Moreover, counsel advises that she communicated by telephone with the defendant's mother who assured counsel that the defendant was in Detroit, supposedly for the suppression hearing. It is clear to us that defendant's absence is purely a voluntary one. To hold that defendant has not waived her appearance by a voluntary absence would produce absurd results. It would permit the defendant to manipulate this court's docket at will. This is especially so after the court endeavored to make the date for her suppression hearing as convenient as possible for the defendant to be present at

the hearing. The date the hearing was conducted was selected by the defendant's counsel.

Accordingly, IT IS ORDERED that defendant's motion to suppress evidence be and the same hereby is denied.

/s/ Robert E. DeMascio
ROBERT E. DEMASCIO
United States District Judge

Dated: November 18, 1976

Pursuant to Rule 77(C), Fed. R. Civ. P. copies mailed to attorneys for all parties on November 18th, 1976.

/s/ Laverne Doss
Deputy Court Clerk

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